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Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE STATE OF TEXAS,
Petitioner

v.

THOMAS EDGAR DANIELS
A/K/A THOMAS EDGAR AUSTIN,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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QUESTIONS PRESENTED FOR REVIEW

I.

WHEN WAS THE RESPONDENT OR HIS LUGGAGE "SEIZED" FOR PURPOSES OF FOURTH AMENDMENT ANALYSIS?

II.

BY WHAT STANDARDS SHOULD THE FACTS PROMPTING AN OFFICER TO QUESTION A SUSPECT AND REQUEST CONSENT TO INSPECT LUGGAGE BE VIEWED BY AN APPELLATE COURT?

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Petitioner respectfully requests that a writ of certiorari issue to review the decision and judgment of the Court of Criminal Appeals of Texas in the case of *Thomas Edgar Daniels a/k/a Thomas Edgar Austin v. The State of Texas,* number 0379-84 in the court below, which reversed Respondent's conviction for possession of a controlled substance.[1]

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas is reported as *Daniels*

1. The State of Texas, as Petitioner, and Mr. Daniels, as Respondent, are the only parties in this cause.

v. State, 681 S.W.2d 78 (Tex. App.—Houston [14th Dist.] 1984). The opinion of the Court of Criminal Appeals of Texas in this cause, No. 0379-84 on the docket of that court, is reproduced in the Appendix "A". The opinion is not yet commercially reported.

JURISDICTION OF THE COURT

The Respondent was charged by indictment with possession of cocaine in violation of Article 4476-15, V.A. C.S. Following denial of a suppression motion, the Respondent entered a plea of not guilty and was found guilty by the trial court. The Respondent presented two grounds of error on appeal to the Court of Appeals for the Fourteenth Supreme Judicial District of Texas at Houston. Both grounds related to the suppression motion and both claimed error under Amendments IV and XIV, United States Constitution. The Respondent did not raise any issue under Texas law. The Court of Appeals overruled both grounds of error and affirmed the conviction on January 26, 1984. The Respondent petitioned the Court of Criminal Appeals of Texas for discretionary review, which was granted on November 14, 1984.

On April 9, 1986, the Court of Criminal Appeals reversed the decision of the Court of Appeals. The Court of Criminal Appeals held that the seizure of the Respondent and the subsequent discovery of controlled substances violated Amendments IV and XIV, United States Constitution. The Court of Criminal Appeals did not reach the second issue of the validity of the Respondent's consent to search his luggage.

The State filed a motion for rehearing. On June 25, 1986, the State's motion for rehearing was denied; it is from the entry of this judgment that this petition for

certiorari is filed. A copy of the Court's certificate is reproduced in Appendix "B".

This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3), which states in part that "a final judgment by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court . . . by writ of certiorari, . . . where any . . . right . . . is . . . claimed under the Constitution . . . of the United States." The decision of the Court of Criminal Appeals clearly was based on the Fourth and Fourteenth Amendments to the United States Constitution. The Court of Criminal Appeals did not even discuss Texas law. It is not even necessary to refer to *Michigan v. Long,* 463 U.S. 1032, 103 S. Ct. 3469, 77 L.Ed.2d 1201 (1983) to determine that there was no independent state law basis for the decision.

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

The Fourth Amendment of the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment was made applicable through Section 1 of the Fourteenth Amendment of the United States Constitution, which states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws. (Emphasis added)

STATEMENT OF THE CASE

Consideration of the two questions presented here requires a summary of the pertinent evidence. Officers Furstenfeld and Bernias of the Houston Police Department narcotics detail were assigned to the Houston Intercontinental Airport and charged with responsibility to detect the flow of illegal narcotics through the airport. On March 5, 1982 they decided to monitor passengers debarking a nonstop flight from Miami because Miami is known as a "source" city for narcotics. Furstenfeld was looking for people who "set themselves apart from other passengers by exhibiting characteristics that normal people do not exhibit" but which have been typically exhibited by narcotics couriers (R. II-4). Officer Furstenfeld recognized the Respondent and a second man, subsequently identified as codefendant Stephen Bogden, as likely suspects on this basis (R. II-4-5). Furstenfeld explained in detail the factors that drew suspicion to the Respondent and Bogden:

(1) The Respondent and Bogden arrived on a plane which flew in nonstop from Miami;

(2) The Respondent and Bogden deplaned separately, but they stopped in the lobby and looked at each other.

The Respondent nodded to Bogden and the men then walked down the concourse separately (R. II-5);

(3) Both the Respondent and Bogden appeared to be more nervous than the other passengers who deplaned (R. II-6, 23);

(4) Officer Furstenfeld observed that both the Respondent and Bogden were looking around the airport lobby excessively, as if they were concerned that someone might be watching them.

Furstenfeld followed the suspects into the airport lobby and down to the baggage claim area. After going down to the baggage claim area separately, the two suspects met and began talking to each other (R. II-8). While Furstenfeld listened surreptitiously, Bogden informed the Respondent that he had to use the bathroom. The Respondent expressed his discontent, remarking "Hurry up . . . I don't want to stay any longer than I have to" (R. II-8). The officers then followed the Respondent and Bogden to the baggage claim area. While waiting for their luggage, the Respondent "was walking around excessively, looking around excessively as if he was very nervous" (R. II-9). Finally, the Respondent retrieved a suitcase from the claim area. The Respondent, Bogden and the officers then got on an elevator and rode to the third level of the parking garage (R. II-10).

When the Respondent left the elevator, Officer Furstenfeld followed him out and asked the Respondent to speak with him for a moment (R. II-11). The Respondent answered "Sure" and then turned to face Furstenfeld (R. II-11). Furstenfeld identified himself as a police officer (R. II-11). Officer Bernias approached Bogden (R. II-12). Officer Furstenfeld asked the Respondent if

he was travelling with Bogden, to which the Respondent replied "he was travelling alone and the other man was not with him" (R. II-12, 47-48). Officer Furstenfeld then asked to see the Respondent's airline ticket, at which point the Respondent produced a ticket jacket bearing two tickets—one in the name of "G. Daniels" and one in the name of "S. Bogden" (R. II-13). The tickets were consecutively numbered and had been paid for on the appellant's credit card (R. II-48). Officer Furstenfeld immediately returned the tickets to the Respondent (R. II-13). Furstenfeld concluded that the Respondent had lied with respect to his companion's travelling status (R. II-41). The Respondent was then asked to produce further identification. The Respondent gave Furstenfeld a temporary Texas driver's license (R. II-14). The license indicated that the Respondent's name was "Thomas Edward (sic) Daniels", though the ticket had been issued to "G. Daniels" (R. II-49).[2] Furstenfeld then returned the identification to the Respondent (R. II-14).

At this point Furstenfeld identified himself as a narcotics officer (R. II-14). The Respondent then "became very nervous. His hands started shaking and his forehead started perspiring" (R. II-15). Furstenfeld asked the Respondent if he had cocaine on his person or in his luggage. The Respondent "stuttered several times and finally said no" (R. II-15).

Furstenfeld then asked permission from the Respondent to search the suitcase that the Respondent was carrying. When the Respondent did not say anything, Furstenfeld informed the Respondent of the fact that the Re-

2. The record does not indicate why the indictment alleged that the Respondent also uses the name "Austin". At all times pertinent to this cause, the Respondent used the last name of "Daniels".

spondent could require him to obtain a search warrant (R. II-15). The Respondent then gave a very interesting reply:

> . . . he said that I could look at the suitcase if I wanted to, that there was no dope in the suitcase. However, it was unlocked when he picked it up and somebody may have put something in it (R. II-15).

When Furstenfeld searched the suitcase, he found a glass water pipe and three plastic bags containing numerous tablets inscribed "Lemon 714" (R. II-16). Having seen such pills on many occasions, Furstenfeld concluded from his past experience that the pills contained either methaqualone or diazepam (R. II-16). Officer Furstenfeld placed the Respondent under arrest for the possession of a controlled substance (R. II-17). Furstenfeld searched the Respondent's person pursuant to the arrest and found a glass vial in the appellant's left front pants pocket (R. II-18). This vial contained a substance which appeared to be cocaine, and a field test indicated that the substance was cocaine (R. II-18). Subsequent laboratory analysis verified that the substance was cocaine.

The Respondent filed a motion to suppress all evidence discovered and seized as a result of the search of his suitcase and the subsequent search of his person (R. I-25-33). Both sides presented evidence at a hearing on the motion, and the trial court then denied the motion.

REASONS FOR GRANTING THE WRIT

At issue here is a procedure which has become a vital part of the enforcement of narcotics laws in this country.

The Houston officers who arrested the Respondent observed the Respondent at an airport and determined that he exhibited certain characteristics which they believed were characteristic of a person engaged in the smuggling of narcotics. Based on that suspicion, Officer Furstenfeld approached the Respondent, questioned him, and ultimately requested the Respondent's permission to examine the contents of the Respondent's suitcase. The Respondent consented, and the suitcase was found to contain suspected illegal drugs. The Respondent was then arrested, with the resulting search producing the cocaine on which this conviction is based. The impact of the Court of Criminal Appeals' decision in this cause goes far beyond the disposition of one case. The scenario presented by the facts herein is replayed constantly at major airports, not only in Texas but across the country. Sometimes the investigating officers are local officers and sometimes they are DEA agents, who utilize a "drug courier profile" which has been developed by that agency.

This Court has had four occasions in this decade to address the type of police procedure involved here. In 1983 this Court issued opinions in *United States v. Place,* 462 U.S. 696, 103 S. Ct. 2637, 77 L.Ed.2d 110 (1983) and *Florida v. Royer,* 460 U.S. 491, 103 S. Ct. 1319, 75 L.Ed.2d 229 (1983). Two 1980 decisions in this area were *United States v. Mendenhall,* 446 U.S. 544, 100 S. Ct. 1870, 64 L.Ed.2d 497 (1980) and *Reid v. Georgia,* 448 U.S. 438, 100 S. Ct. 2752, 65 L.Ed.2d 890 (1980). The number of intermediate appellate decisions on this topic, both federal and state, is vast. These cases present some factual variations, and such variations necessarily lead to disparate results when the issue is viewed as resting on the facts available to an officer in any given situ-

ation. This cause affords this Court the opportunity to restate and clarify the controlling law in this area. Two aspects of the law should be considered and form the basis for the two questions presented for review.

I.

First, this Court should clarify when a seizure occurs in this type of case. Specifically, this Court should resolve the continuing controversy over Part II-A of the Court's opinion in *Mendenhall.* Mendenhall, like the Respondent herein, became an object of suspicion at an airport because she displayed certain characteristics of a narcotics "courier". Five members of this Court concluded that the detention of Mendenhall in an airport office and the search of her person was legal. All five members of the majority agreed that Mendenhall voluntarily consented to go to the private office and to be searched. Three members of the majority did not join the holding of Part II-A of the opinion of the Court, wherein it was stated that the initial encounter and conversation between officers and Mendenhall did not constitute a seizure for Fourth Amendment purposes. Four dissenting members of this Court criticized the finding that no seizure occurred because "the Government never questioned that the intial stop of Ms. Mendenhall was a 'seizure' that required reasonable suspicion." 446 U.S. at 567, 100 S. Ct. at 1884. Based on this procedural point, the dissenters assumed that the initial encounter constituted a seizure. 446 U.S. at 571, 100 S. Ct. at 1886.

This Court again had occasion to consider the issue in *Reid v. Georgia,* but that case produced a per curiam opinion which did not precisely address the issue of

whether a seizure occurred.[3] The per curiam opinion found similarities between Reid and the DEA's "drug courier profile" to be an insufficient basis for suspicion, then jumped to the conclusion that "the judgment of the [Georgia] appellate court cannot be sustained insofar as it rests on the determination that the DEA agent lawfully seized the petitioner when he approached him outside the terminal." 448 U.S. at 442, 100 S. Ct. at 2754. Nothing in the per curiam opinion explains why that "approach" and questioning by the DEA officer should have been deemed a seizure. Justice Rehnquist dissented and referred to Justice Stewart's *Mendenhall* opinion. Justice Powell, Chief Justice Burger, and Justice Blackmun only concurred because "the state courts, which decided this case before our decision in *Mendenhall,* did not consider whether the petitioner [Reid] had been seized." 448 U.S. at 443, 100 S. Ct. at 2755. Thus *Reid* is not a definitive holding that mere questioning constitutes a seizure.

This Court once again addressed the apprehension of a narcotics courier at an airport in *Royer, supra,* but a clear holding on when a seizure occurs fails to emerge from the disparate opinions in *Royer.* A plurality of four justices, in an opinion authored by Justice White (the author of the *Mendenhall* dissent) stated six general observations as a framework for analysis. The second of these observations stated:

> Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by

3. The Petitioner respectfully submits that *Reid* is wrong and should be overruled, as will be discussed more fully in the second issue.

> putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. 460 U.S. at 497, 103 S. Ct. at 1324.

The plurality opinion did not make an explicit application of that principle to the facts in *Royer*. Arguably the plurality suggested that a Florida officer's initial encounter with Royer was not a seizure by stating that "[a]sking for and examining Royer's ticket and his driver's license were no doubt permissible in themselves." 460 U.S. at 501, 103 S. Ct. at 1326. Yet the same language also could be read as merely an endorsement of police reliance on a "drug courier profile." The issue was not developed further because the lower court's decision reversing Royer's conviction was upheld on the basis of what occurred later in the investigation.

Justice Brennan, concurring in the result in *Royer*, argued that "[t]o the extent that the plurality endorses the legality of the officers' initial stop of Royer, . . . it was wholly unnecessary to reach that question." 460 U.S. at 509, 103 S. Ct. at 1330. Justice Brennan went on to express the view that the initial detention was illegal, which implies that the initial stop was a seizure for Fourth Amendment purposes. 460 U.S. at 511, 103 S. Ct. at 1331. Justice Blackmun's dissent does not specifically address this question, though it does characterize the detention of Royer in a private room as a lesser degree of detention than would constitute an arrest. The dissent by Justice Rehnquist, joined by the Chief Justice and Justice O'Connor, approvingly referred in footnote 3 to "the plurality's intimation that when the detectives first approached and questioned Royer, no seizure occurred." 460 U.S. at 523, 103 S. Ct. at 1338. The citation to the

plurality opinion for this "intimation" refers to 103 S. Ct. at 1324, which contains a general discussion of principles. Thus, when all the opinions in *Royer* are considered, there was not a clear majority holding that the intial encounter between Royer and Florida officers was outside the realm of Fourth Amendment seizures.

United States v. Place recognized the distinction between seizure of the person and seizure of property, but also recognized the close link between the two in the context of a temporary seizure of a traveler's luggage. 462 U.S. at 708-709, 103 S. Ct. at 2645. This cause illustrates that interrelationship. If the Respondent's person was "seized" at some point while he was carrying the luggage, his luggage also was seized. On the other hand, as pointed out in *Place,* holding a person's luggage can have the effect of limiting a person's "liberty interest in proceeding with his itinerary." Unfortunately *Place* also did not resolve the question of when a seizure of either Place or his property first occurred. The majority opinion held that a seizure of property undoubtedly did occur when DEA agents told Place that they were confiscating his luggage and would take it to a federal judge and attempt to obtain a search warrant. The length and nature of this seizure was found to be unreasonable. Thus it was unnecessary in *Place* to determine whether the agent's conduct constituted a seizure at some earlier point in the investigation.

In the present cause, the Court of Criminal Appeals correctly declined to treat the initial encounter between Furstenfeld and the Respondent as a seizure. This portion of the decision below was favorable to the Petitioner. The Petitioner conceded below, and concedes in this Court, that there was a seizure, but not an arrest, at

the point where Furstenfeld requested consent to examine the suitcase. Both the Respondent and his luggage were seized at this point. The Petitioner does *not* concede that all requests for consent in this context necessarily constitute a seizure; what is decisive on the question herein is that the circumstances in this cause indicate some show of legal authority by Furstenfeld, namely the mention of the warrant power. Here it should be noted that Furstenfeld made it clear that, if the Respondent had refused consent, the suitcase would have been retained while the Respondent would have been released. That is what occurred in *Place*. This cause differs from *Place*, however, in that the Respondent consented to inspection of the suitcase.[4] The appellant's rationale is that the consent was tainted by unlawful seizure of his person.[5] For reasons discussed below, the Court of Criminal Appeals erred in deciding that the detention of the Respondent which took place at the time of the request for consent was not supported by an adequate level of suspicion. Therefore the only way in which a lack of adequate justification for a seizure could be found would be if a seizure occurred at some earlier point. Thus this cause implicitly requires this Court to provide a definitive answer to the question whether Part II-A of Justice

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4. A second appellate ground concerning the trial court's finding that consent was given was not considered by the Court of Criminal Appeals.

5. While it is true that the Respondent was convicted on the count alleging possession of cocaine, which was found on his person rather than in the suitcase, nothing indicates that the Respondent was under arrest during the examination of the suitcase. His voluntary continued presence at the scene merely made his arrest more convenient and coincidentally produced the windfall discovery of the cocaine. It was simply prosecutorial discretion which resulted in the cocaine possession count, rather than the methaqualone count, being the basis for conviction.

Stewart's opinion in *Mendenhall* (and the footnote in Justice Rehnquist's *Royer* dissent) is correct. Even the dissenters in *Mendenhall* should agree that this cause provides an appropriate opportunity for this Court to resolve the controversy surrounding Part II-A of Justice Stewart's opinion in *Mendenhall.*

Concededly this question could be avoided by correctly analyzing the second question and refusing to address the first issue because the Court of Criminal Appeals held favorably to the Petitioner on the first issue. Since the second issue undoubtedly calls for review, however, the Petitioner believes that judicial economy would be well served by addressing the first issue as well. Resolution of this issue would provide guidance to courts and law enforcement officials in other cases which might well save this Court more work at some later date.

II.

As stated above, the Court of Criminal Appeals agreed with the Petitioner's focus on the moment when consent to search was requested as the point at which it was necessary for Furstenfeld to have reasonable suspicion supporting his actions. The Petitioner contends, as it has below, that the Respondent was not under arrest at this point. Rather, the procedure used by Furstenfeld amounted to no more than a temporary investigative detention, and that only because some of his actions could be construed as a show of authority. This brings into play the third "preliminary observation" in the plurality opinion in *Royer:*

> [I]t is also clear that not all seizures of the person must be justified by probable cause to arrest for a crime. Prior to *Terry v. Ohio,* [392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968)], any re-

> straint on the person amounting to a seizure for the purposes of the Fourth Amendment was invalid unless justified by probable cause. [Citation omitted.] *Terry* created a limited exception to this general rule: certain seizures are justifiable under the Fourth Amendment if there is articulable suspicion that a person has committed or is about to commit a crime. . . . Although not expressly authorized in *Terry*, *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-882, 95 S. Ct. 2574, 45 L.Ed.2d 607 (1975), was unequivocal in saying that reasonable suspicion of criminal activity warrants temporary seizure for the purpose of questioning limited to the purpose of the stop.

The fourth "preliminary observation" in *Royer* noted that *Terry* and its progeny only created a limited exception to the requirement of full probable cause to arrest. The *Royer* plurality opinion pointed out that the level of suspicion which would support a brief investigative detention would not support "a full search of the person or of his automobile or other effects." 460 U.S. at 499, 103 S. Ct. at 1325. Both the majority opinion and Justice Brennan's concurrence in *Place* point out that a suitcase would be one of those "effects." Yet *Terry* did allow a search strictly limited by the circumstances establishing suspicion, namely a "frisk" for weapons based on circumstances suggesting that Terry and a colleague were preparing for a robbery. The *Royer* plurality opinion summarized the general doctrine thusly:

> An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. 460 U.S. at 500, 103 S. Ct. at 1325-1326.

Like the dissenters in *Royer,* the Petitioner strongly disagrees that there is a "least intrusive means" requirement implicit in the Fourth Amendment. Whether there is such a requirement or not, however, a request for consent to search is certainly a procedure which ranks low on the scale of intrusiveness. Furstenfeld was asking to do no more than something every airplane passenger tacitly accepts with regard to carry-on luggage. It is not necessary to resolve the "least intrusive means" controversy here because the plurality's sixth "preliminary observation" squarely answered the question presented by this cause:

> [I]f the events in this case amounted to no more than a permissible police encounter in a public place or a justifiable *Terry*-type detention, Royer's consent, if voluntary, would have been effective to legalize the search of his two suitcases. *Cf. United States v. Watson,* 423 U.S. 411, 424-425, 96 S. Ct. 820, 828-829, 46 L.Ed.2d 598 (1976). 460 U.S. at 501, 103 S. Ct. at 1326.

In *Royer* the degree of detention was found to exceed a permissible *Terry* detention, as the Miami officers took Royer to a private room while retaining his airplane ticket and driver's license. The facts in this cause, however, do not show that degree of restraint. In fact, the *Royer* plurality virtually anticipated the facts of this cause when it juxtaposed a hypothetical situation with what actually occurred in *Royer:*

> The record does not reflect any facts which would support a finding that the legitimate law enforcement purposes which justified the detention in the first instance were furthered by removing Royer to the police room prior to the officer's attempt to gain

> his consent to a search of his luggage. As we have noted, *had Royer consented to a search on the spot, the search could have been conducted with Royer present in the area where the bags were retrieved by Detective Johnson and any evidence recovered would have been admissible against him.* 460 U.S. at 505, 103 S. Ct. at 1328 (emphasis added).

In *United States v. Place* this Court had occasion to consider the distinction between a seizure of a suspect's person and a seizure of the suspect's property. There, as here, the property which officers wanted to inspect was a suitcase being carried by a suspected narcotics courier. The majority opinion stated that it was appropriate to apply the principles of *Terry* "to permit such seizures on the basis of reasonable, articulable suspicion." 462 U.S. at 702, 103 S. Ct. at 2642. This Court agreed that a brief seizure "to pursue further investigation" was justified by "specific and articulable facts warranting a reasonable belief that a traveler's luggage contained narcotics." Balancing the degree of intrusion against the government interest being served, the Court gave its general approval to the prompt use of a dog trained to sniff out narcotics. The particular procedure used in *Place* was held impermissible, however, because Place's luggage was retained for a substantial length of time without his consent. In fact, the luggage was taken to a different airport in order to have it sniffed by a trained dog.

In the present case no dog was summoned because the need for a dog was obviated by the Respondent's consent. Furstenfeld said the suitcase would be retained for sniffing by a "custom" [probably should be "Customs"] dog. The record does not indicate the availability of a dog in this instance or whether a dog would be able to

detect the pills by odor. Nevertheless, it is clear that Furstenfeld's plan of action, in the absence of consent, would be consistent with what this Court apparently approved in *Place*. Moreover, the request for consent was the least intrusive alternative. In given instances a suspect may prefer a consensual search over resort to canine investigative techniques.

It seems obvious that the Petitioner herein was required to show nothing more than Furstenfeld's articulable suspicion that the Respondent was carrying narcotics in his suitcase at the time consent was requested. The Court of Criminal Appeals incorrectly held that the Petitioner failed to meet this burden. This erroneous result was reached because the Court of Criminal Appeals used an analytical framework which was at odds with this Court's caselaw in two respects.

The Court of Criminal Appeals reviewed the various facts cited as bases for suspicion by Furstenfeld, but it did so by analyzing each fact in isolation. That is in clear conflict with the standard for review set forth by this Court in *Terry, supra,* and other cases. This Court has made it clear that it is the totality of the observable circumstances which should be considered in determining whether an officer had reasonable suspicion that would justify a temporary investigative stop. This is a fundamental premise of *Terry*:

> [The officer] had observed Terry, Chilton, and Katz go through a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation. 392 U.S. at 22, 88 S. Ct. at 1880-1881.

Perhaps Judge Irving R. Kaufman expressed the rule best in *United States v. Ramirez-Cifuentes,* 682 F.2d 337, 342 (2d Cir. 1982):

> In considering whether the facts and inferences support a reasonable suspicion, we must view [DEA] Agent Iglesias' observations as a whole, not a single, disconnected occurrences. In sum, we view the whole mosaic rather than each tile.

Summarizing this Court's caselaw on this rule, *United States v. Cortez,* 449 U.S. 411, 417, 101 S. Ct. 690, 695, 66 L.Ed.2d 621 (1981) stated that "the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account."

The Court of Criminal Appeals compounded its error in disregarding this rule by also disregarding another precept of this Court's caselaw regarding reasonable suspicion. In reviewing the factors relied upon by an officer, this Court (and other courts) should view the circumstances from the officer's point of view, particularly when the officer has considerable expertise and experience in the investigation of the type of crime which is suspected in a given case. As this Court stated in *United States v. Cortez,* 449 U.S. at 418, 101 S. Ct. at 695:

> The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person.
>
> The process does not deal with hard certainties, but with probabilities. . . . Finally, the evidence thus

> collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in law enforcement.

The record in the present cause indicates that Officers Furstenfeld and Bernias specialized in this type of investigation. Indeed, Furstenfeld did not rely directly on the "drug courier profile" which has been compiled by the DEA, but rather was relying on factors which he had found to be reliable through his own experience. Of course the validity of that experience is supported by the similarities between Furstenfeld's criteria and the DEA drug courier profile, which, notwithstanding the skepticism expressed in *Reid v. Georgia,* has been shown to have an excellent record of reliability. *United States v. Mendenhall,* 446 U.S. at 562, 100 S. Ct. at 1881 (Powell, J., concurring).

In the present cause, the Court of Criminal Appeals first attacked the factors which originally drew Furstenfeld's attention to the Respondent and Bogden. Three factors were specifically mentioned, and each was disparaged in turn. For example, the fact that the Respondent was on a flight from Miami was deemed inconsequential because that "did not distinguish him from any other passenger on the nonstop flight." What did create such a distinction, of course, was the combination of factors. The fact that the Respondent arrived on a flight from Miami contributes to the reasonable suspicion because, as Furstenfeld testified, Miami is a known "source" city for shipments of illegal narcotics. Instead of viewing this fact in light of Furstenfeld's experience, the Court of Criminal Appeals apparently assigned no significance to this notoriety of Miami.

The strongest support for this rejection of factors corresponding to part of the DEA's drug courier profile is *Reid v. Georgia, supra.* Thus, it is rather surprising that *Reid* is only cited once as authority by the Court of Criminal Appeals, and then only as to the significance of one particular factor. As suggested above, *Reid* is at odds with the limited amount of empirical data on the drug courier profile which has found its way into this Court's opinions. The Petitioner believes that the DEA and other agencies could provide additional information showing the reliability of this type of technique. This Court has resorted to such extraneous material in the past, such as police manuals which were cited by the majority opinion in *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966). Even without resort to such extraneous materials, however, *Reid* should be overruled. Like the Court of Criminal Appeals' decision herein, *Reid* is at odds with this Court's doctrine that observable circumstances—including those contained in a drug courier profile—should be viewed from the perspective of the officer making the observations.

Besides the factors preceding the confrontation in the garage, Furstenfeld also gathered other information in the course of talking to the Respondent which added to the totality of reasonable suspicion. These, too, were addressed in a piecemeal fashion rather than being considered together for their cumulative probative value. When asked by Furstenfeld whether he was travelling with Bogden, the Respondent said he was not. Based on earlier observations, that appeared to Furstenfeld to be a lie. The Respondent also was carrying Bogden's airline ticket, which also belied his denial of being Bogden's travelling companion. Why would an innocent man lie

about an apparently innocuous fact? The answer is that an innocent man probably would not. It is of such probabilities, not certainties, that "reasonable suspicion" is made. The Court of Criminal Appeals hypothesized a number of alternative explanations in a manner more appropriate to a review of the sufficiency of trial evidence to show guilt beyond a reasonable doubt. Finally, the Respondent became visibly disturbed when Furstenfeld identified himself as a narcotics officer. The Court of Criminal Appeals answered that fact with the assertion that "many people react nervously to being approached by police." Aside from being a mere assertion, that statement is no answer to the fact that the Respondent became distinctly more nervous when Furstenfeld mentioned narcotics.

The Court of Criminal Appeals' opinion twice acknowledged its responsibility to review the facts "in the light most favorable to the trial court's ruling," but that clearly was not done with regard to the trial court's decision on the question of reasonable suspicion. The repudiation of the decisions by the district court and the Court of Appeals can only be justified if Furstenfeld's rationale for the investigative procedures he used was categorically invalid as a matter of law. Because the Court of Criminal Appeals chose to define the pertinent federal constitutional law in a manner at odds with this Court's jurisprudence, this Court should grant a writ of certiorari and reverse the decision of the Court of Criminal Appeals. Because *Reid v. Georgia* is likewise an incorrect decision, it should be overruled at this time.

CONCLUSION

For the aforesaid reasons, The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

NO. 379-84

THOMAS EDGAR DANIELS, a/k/a
THOMAS EDGAR AUSTIN, Appellant

v.

THE STATE OF TEXAS,
Appellee

Petition for Discretionary Review from the Court of Appeals, Fourteenth Supreme Judicial District of Texas [HARRIS County]

OPINION ON APELLANT'S PETITION FOR DISCRETIONARY REVIEW

After his motion to suppress evidence was denied, appellant pled not guilty and was tried before the trial court. Appellant and the State entered into a stipulation of evidence on the basis of which appellant was found guilty of possesssion of a controlled substance and sentenced to five years imprisonment in the Texas Department of Corrections. His conviction was affirmed by the court of appeals. Daniels v. State, 681 S.W.2d 78 (Tex. App.—Houston [14th] 1984).

Appellant objected to the admission of evidence seized from him during an airport stop and search. The court of appeals held that the trial court properly overruled appellant's motion to suppress because the investigating officer had reasonable grounds to temporarily detain appellant and appellant then consented to the search of his suitcase. We granted appellant's petition to review these findings of the court of appeals.

At nine o'clock in the morning Officers Furstenfeld and Bernias of the Houston Police Department were at Houston Intercontinental Airport watching passengers deplane from a nonstop flight from Miami. This surveillance was conducted "in an attempt to identify and intercept narcotic couriers who are bringing dope into Houston." The officers were not operating on information from an informant or law enforcement agency, they were just scanning the passengers to see if any aroused their suspicions. Two men did.

Officer Furstenfeld testified that he was suspicious first of all because the men were coming from Miami, a known source city for narcotics traffic. Of course, that was true of all the passengers. What distinguished appellant and his companion in Officer Furstenfeld's eyes was that the two men deplaned separately but then their eyes met. After a brief nod from one of them they proceeded down the concourse without speaking, but looking around nervously. Furstenfeld concluded the two were travelling together but trying to disguise that fact. He also thought they were looking back furtively as if trying to detect surveillance. If so they were unsuccessful, because Furstenfeld and Bernias followed the men to the baggage claim area without being detected.

In the baggage claim area one of the suspects handed his suit bag to the other and went to the restroom. Upon his return the men stood together, talking and joking, until a white suitcase arrived. Appellant claimed the bag and he and his companion took an elevator to the covered parking area. They were joined in the elevator by the two narcotics officers. Once all four were in the parking area Officer Furstenfeld spoke to appellant. What happened next was a matter of dispute at the hearing on the

motion to suppress. However, viewing the evidence in the light most favorable to the trial court's ruling on the motion, the facts are these.[1] The officer approached appellant and asked if he might ask him a few questions. Appellant said sure. Furstenfeld identified himself as a police officer conducting an investigation and asked if he could question appellant. Appellant again consented. Furstenfeld asked if appellant and the other man were travelling together. Appellant replied that they were not. (The other man, Steve Bogden, had walked on ahead and been stopped by Officer Bernias.) The narcotics officer asked if he could see appellant's identification and plane ticket. Appellant handed him a temporary Texas driver's license in the name Thomas Daniels and a ticket folder that contained two tickets, one made out to G. Daniels and the other S. Bogden. Furstenfeld returned these items and informed appellant that he was a narcotics officer. Appellant grew visibly more nervous at this news, Furstenfeld testified. He asked permission to search appellant's luggage, informing him that he did not have to consent, but could instead require the officer to produce a search warrant. Appellant, however, consented to the search. Furstenfeld found tablets he took to be illegal drugs, and

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1. It was for the trial court, as the sole finder of fact at the suppression hearing, to determine whose version of the facts was true, and the court found that the arrest was lawful. Walker v. State, 588 S.W.2d 920, 924 (Tex. Cr. App. 1979).

Appellant's testimony was that he was stopped as soon as he stepped off the elevator, that Officer Furstenfeld blocked his path and identified himself as a police officer. He asked why appellant hadn't come in the night before, saying they had word a man fitting appellant's description was supposed to be in the airport the night before, bringing cocaine from Florida. Appellant testified further the officer neither asked for nor received consent to search the suitcase. "He slammed me around against the lockers and started searching." No one told appellant he could leave or demand a search warrant.

arrested appellant. A subsequent search of appellant's person turned up the cocaine for possession of which he was convicted.

The questions to be decided are, when did the officer have legally sufficient reason to detain appellant, and when did he need it?

Not all encounters between police and citizens invoke the protection of the Fourth Amendment. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968). Police are as free as anyone else to ask questions of their fellow citizens. Only when the questioning becomes a detention, however brief, must it be supported by reasonable suspicion. Reasonable suspicion is a lesser quantum of proof than the probable cause required for a full blown arrest and search. Even a brief investigatory stop, however, must be based on "specific, articulable facts, which in light of [the police officer's] experience and general knowledge, together with rational inference from those facts, would reasonably warrant the intrusion on the freedom of the citizen stopped for further investigation." Brem v. State, 571 S.W.2d 314, 318 (Tex. Cr. App. 1978). A mere hunch is insufficient:

> "There must be a reasonable suspicion by the officer that some activity out of the ordinary is occurring or had occurred, some suggestion to connect the detained person with the unusual activity, and some indication that the activity is related to a crime. Where the events are as consistent with innocent activity as with criminal activity, a detention based on those events is unlawful."

Johnson v. State, 658 S.W.2d 623, 626 (Tex. Cr. App. 1983). We must therefore determine at what point, if

any, appellant was detained for purposes of the Fourth Amendment, and on what Officer Furstenfeld's suspicion was based at that point.

The officer first spoke to appellant just after the two exited from the elevator into the covered parking area, when it was clear appellant was leaving the airport. The officer's suspicion up to then had been aroused because: (1) appellant deplaned separately from Bogden but then made eye contact with him; Furstenfeld suspected they were travelling together but trying to hide the fact; (2) appellant appeared nervous and looked behind him as he walked down the concourse ("It wasn't continuous, but each looked about two times apiece"); and (3) appellant had arrived on a flight from Miami.

Clearly these were not reasonable grounds for any level of suspicion. If appellant and Bogden were trying to disguise the fact that they were travelling together, they did a very poor job of it. They deplaned separately but walked down the concourse side by side, though a few feet apart. Once in the baggage claim area they stood together talking and joking, and Bogden gave appellant his bag to hold while he went to the restroom. Furstenfeld, who saw all this, must have had allayed his suspicion that the men were trying not to appear to know each other. The fact that appellant was arriving from Miami did not distinguish him from any other passenger on the nonstop flight. That leaves only appellant's apparent nervousness and "furtive eye movements." As the United States Supreme Court said of a stop based on similar suspicions, these circumstances

> "describe a very large category of presumably innocent travelers, who would be subject to virtually

> random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure."

Reid v. Georgia, 448 U.S. 438, 441, 100 S. Ct. 2752, 2754, 65 L.Ed.2d 890 (1980).

This Court has held it unreasonable to stop a pedestrian solely because he looks over his shoulder at a police car. Rodriguez v. State, 578 S.W.2d 419 (Tex. Cr. App. 1979). It would be no more reasonable to stop a man who looks over his shoulder twice in an airport concourse. As for the "furtive" eye movements, they could not have been more suspicious than the furtive gestures with which this Court has often dealt, which will not be reasonable ground for suspicion where they are consistent with innocent activity.

> ". . . , such so-called 'furtive gestures' do not bear with them the indicia of a guilty mens rea as they would had the stopping police officer been occupying a marked police vehicle. In this case, it was an unmarked police vehicle."

Faulk v. State, 574 S.W.2d 764, 766 (Tex. Cr. App. 1979). In the instant case the plainclothes detective was the equivalent of an unmarked police car. It was no basis for suspicion that appellant, who had just disembarked from an airplane, acted nervous in the officer's presence.

So at the point of the initial encounter, Officer Furstenfeld had no grounds for reasonable suspicion. As we have already seen, however, he needed none. It was permissible for him to approach appellant and ask to speak with him. At that point appellant, in theory at least, could have still walked away freely.

Perhaps as in Eisenhauer v. State, 678 S.W.2d 947, 954 (Tex. Cr. App. 1984), appellant's seemingly innocent activity might have been rendered suspicious in light of an informant's tip, but here there was no tip. Officer Furstenfeld was acting strictly on the basis of what he observed.

Following the initial exchange the officer asked if appellant was travelling with Bogden and was told he was not. Officer Furstenfeld then asked to see appellant's ticket and identification. Noting that appellant carried two airline tickets and that one of them was made out to "G. Daniels" though appellant's driver's license gave his name as Thomas Daniels, the officer identified himself further as a narcotics officer conducting an investigation, and asked for consent to search appellant's suitcase. The State concedes this was a detention, and we agree.[2]

Officer Furstenfeld testified, "I advised him that if he so desired that he could require me to produce a search warrant prior to a search. I advised him that he did not have to consent to the search." On crossexamination, to the question, "So he could have picked up his suitcase and left?" he responded, "No, sir, I didn't tell him that." Furstenfeld said that in fact appellant was still free to take his suitcase and leave at that point, but when the same question was repeated, his answer was more ambiguous:

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2. Justice Brennan would also agree: "It is simply wrong to suggest that a traveller feels free to walk away when he has been approached by individuals who have identified themselves as police officers and asked for, and received, his airline ticket and driver's license." Florida v. Royer, 460 U.S. 491, 103 S. Ct. 1319, 1311, 75 L.Ed.2d 229 (1983) (Brennan, J., concurring).

"Q. Would he have been free to take his suitcase and leave?

A. We use custom dogs when we need them."

And later in response to the question what he would have done if appellant had refused to consent to the search: "I would have taken his name and address and held the bag until we had a chance to get a dog and the search warrant."

Less than probable cause is required to briefly seize a suspect's luggage, long enough to have it sniffed by dogs or to obtain a search warrant. United States v. Place, 462 U.S. 696, 103 S. Ct. 2637, 77 L.Ed.2d 110 (1983). Even such a brief detention, however, must be justified by "specific and articulable facts warranting a reasonable belief that a traveler's luggage contains narcotics." *Id.*, at 2642.

The officer's responses as to whether he would have allowed appellant to leave with his luggage at that point were contradictory. The test, though, is to be applied from the *suspect's* point of view, whether there has been such a display of authority that "a reasonable person would have believed he was not free to leave." United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877, 64 L.Ed.2d 497 (1980). This Court applied that test in *Eisenhauer*, supra, and found the suspect there was effectively seized when surrounded in an airport terminal by four plainclothes police officers who told him he was suspected of transporting narcotics, asked for permission to search his bag, and gave no indication that he was free to leave.

Appellant in the instant case would be similarly unlikely to think himself free to leave when he had been

stopped by an armed man[3] who identified himself as a narcotics officer, a few feet away Bogden had been stopped by another officer, Furstenfeld said he was conducting an investigation, implied that he could obtain a search warrant, and gave no indication appellant could depart. At this point the encounter amounted to at least an investigatory stop. Reasonable suspicion was therefore required to justify it.

In *Eisenhauer,* supra, an informant's tip supplied a strong ground for reasonable suspicion after much of its information was verified. Here there was no such tip. The additional bases for suspicion turned up by Furstenfeld's questioning of appellant were (1) appellant grew visibly more nervous when his questioner identified himself as a *narcotics* officer; (2) appellant's driver's license identified him as Thomas Daniels and his plane ticket was in the name *G.* Daniels; and (3) appellant denied travelling with Bogden but was carrying two plane tickets and Furstenfeld had seen the two men together.

As for the first factor, nervousness when suddenly confronted by a police officer who asks one questions is as indicative of innocence as of guilt. Glass v. State, 681 S.W.2d 599, 602 (Tex. Cr. App. 1984). Many people react nervously to being approached by police.

The discrepancy in initials is of little consequence. In United States v. Glass, 741 F.2d 83 (CA5 1984), it was held that even in the light of an initial anonymous tip, the fact that someone is travelling under an assumed name does not give rise to a reasonable suspicion that he is carrying narcotics. Here appellant was travelling only under an assumed initial, but he had paid for his ticket

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3. Appellant testified he had seen the officer's gun, and no witness contradicted him.

with a credit card bearing his correct name, the imprint of which appeared on the ticket.

This leaves as the basis for suspicion only that appellant denied he was travelling with Bogden. It was clear the two men knew each other, but Officer Furstenfeld testified specifically that appellant did not say he did not *know* Bogden, only that he was not travelling with him. Yet appellant had two airline tickets in his ticket folder. As Furstenfeld had not yet spoken to Bogden, however, and did not know his name, he had no way of knowing whether the second ticket was his. It was as likely the two men had just met on the plane and would be going their separate ways again when they reached their cars; or that appellant feared Bogden was the actual focus of a police investigation and wished to disassociate himself from him. Even if Furstenfeld's conclusion that appellant was lying gave rise to a reasonable suspicion "that some activity out of the ordinary is occurring or has occurred," it was not a reasonable ground for concluding that the unusual activity was criminal or that appellant was connected to the hypothetical crime. Meeks v. State, 653 S.W.2d 6, 12 (Tex. Cr. App. 1983).

There is finally the issue of appellant's alleged consent to search his luggage.[4] It is at least arguable that Furstenfeld's telling appellant he could force the officer to obtain a warrant for the search implied that a warrant *could* be

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4. Reviewing the facts in the light most favorable to the trial court's ruling we assume appellant did consent to the search of his suitcase. We note, however, the remark by the Fifth Circuit Court of Appeals in United States v. Berry, 670 F.2d 583 (CA5 1982) at n. 16: "We think it strikingly unusual that so many individuals stopped at airports consent to search while carrying drugs, and even show where they have hidden drugs. Though 'the question is not whether respondent acted in her self-interest [by consenting to a search], but whether she acted voluntarily,' the courts should consider how reasonable a story is in determining whether consent was given voluntarily [citations omitted throughout]."

obtained, leaving appellant to conclude a search was inevitable with or without his consent. That would have rendered the consent invalid. See Doescher v. State, 578 S.W.2d 385, 391 (Tex. Cr. App. 1979). We need not reach that issue because the consent, valid or not, was the result of the illegal stop and thus fatally tainted by the illegality of the stop. *United States v. Glass,* supra; United States v. Ballard, 573 F.2d 913, 916 (CA5 1978).

We reiterate what was said in Davis v. State, 576 S.W.2d 378, 380 (Tex. Cr. App. 1979), concerning the requirement that an officer have specific and articulable facts justifying his suspicion before an investigatory stop will be valid:

> "This requirement must not become a mere form of words. To allow searches without actual justification would eviscerate the Fourth Amendment guarantees against unreasonable search and seizure. The test is whether the facts known to the officer at the moment of the stop and search would warrant a man of reasonable caution in belief that the action taken was appropriate."

The facts known to the officer in the instant case did not render his action appropriate. The evidence seized as a result of the illegal stop should have been suppressed. Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L.Ed.2d 441 (1963).

The judgment of the court of appeals is reversed and the cause is remanded for new trial.

CLINTON, Judge

(Delivered April 9, 1986)

EN BANC

PUBLISH

McCormick, J., dissents

APPENDIX B

CLERK'S OFFICE
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

I, THOMAS LOWE, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 379-84 styled:

THOMAS EDGAR DANIELS aka
Thomas Edgar Austin APPELLANT

v.

STATE OF TEXAS

On March 28, 1984 the Appellant's Petition for Discretionary Review of the judgment of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas was filed with this Court.

On April 9, 1986 the Judgment of the Court of Appeals was reversed and the cause was remanded to the Trial Court for a New Trial.

On June 25, 1986 the State's Motion for Rehearing was denied and the Mandate of this Court has been stayed until the 8th day of September, 1986.

WITNESS my hand and seal of said Court, at my office in Austin, Texas this the 8th day of August, A.D., 1986.

/s/ THOMAS LOWE
Thomas Lowe, Clerk of the Court
of Criminal Appeals of Texas